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SUBJECT: ICJ FENCE PROCEEDINGS WRAP-UP

REF: A. OLC/HAGUE-STATE/L EMAIL REPORTS

[B](#). HTTP://212.153.43.18/ICJWWW/IDOCKET/IMWP/IMWP FRAM-
E.HTM

1.(SBU) Summary: From February 23 to 25 the International Court of Justice (ICJ) heard arguments from twelve states, two organizations and Palestine in its case assigned the title, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory." In general, the atmosphere in the ICJ's courtroom at the Peace Palace was judicial -- as in the usual case, all fifteen judges sat in their black robes and white collars on a raised dais and listened patiently, and silently, while advocates pled their arguments below them. The general decorum maintained throughout, with the most strident rhetoric reserved for the German and French law professors who presented arguments for the Arab League and Organization of the Islamic Conference (OIC), respectively, on the final day. Even outside the Peace Palace, demonstrators on both sides of the fence made their cases without incident, the Dutch having prepared efficiently for the occasion by blocking traffic in the area and staggering the times protesters could gather. Attention now turns to the deliberations and the possibility of an advisory opinion being issued in the near-term. End summary.

[2](#). (SBU) The ICJ held its long-awaited hearings on the United Nations General Assembly's request for an advisory opinion as to the legal consequences of the security barrier (Israel's term) or "the Wall" (Palestine's term) Israel is constructing in the West Bank. The media tents and protesters outside did not change the basic fact that judicial proceedings were being held in the Peace Palace, and the atmosphere inside approximated the atmosphere of other proceedings embassy legal officers have attended in recent years (except for the larger than usual attendance of approximately 250 people in the courtroom). On the first day, Palestine was granted the whole morning (three hours) to present its case, and it did so, following the introduction of Palestinian UN Permanent Representative Nasser al-Kidwa, with the assistance of American, British, Australian, Egyptian and Belgian advocates. Following Palestine were, on the 23rd, South Africa, Algeria, Saudi Arabia, Bangladesh; on the 24th Belize, Cuba, Indonesia, Jordan, Madagascar, Malaysia, Senegal; and on the 25th Sudan, the Arab League and the OIC. Apart from Palestine, all delegations were provided forty-five minutes each to make their arguments. In the courtroom were dozens of representatives of governments which had submitted written comments to the Court in January, including an official Israeli delegation.

[3](#). (SBU) Palestine led off with a short but effective factual presentation, complete with slides of maps and photographs, and throughout the hearing other participants echoed the factual presentation. Although the advocates tended to emphasize different aspects of the question, three principal categories of arguments were presented throughout the hearing: first, that the UNGA had the competence to make the request and the ICJ has no grounds on which to decline to render an opinion; second, that the Fence is being built on occupied territory to which the Fourth Geneva Convention on the Protection of Civilians applies and, on this ground and others, violates various provisions of international humanitarian and human rights law; and third, that legal consequences flow from these violations for Israel, other states, and international organizations, particularly the UNGA and the UN Security Council. A detailed summary of the individual arguments may be found in ref e-mails, while the transcripts of the proceedings may be found at the ref website.

[4](#). (SBU) While the refs detail the arguments presented, several themes may be identified as dominating the proceeding:

-- ICJ Jurisdiction: All argued in favor of the Court's jurisdiction, the UNGA's competence to request the opinion, the impossibility of the Court refusing to issue an opinion, and the propriety and value of the Court doing so.

-- The Fence itself: Most of the delegations argued that the problem was less a security fence in general but "the specific characteristics" of the current fence. Consistently advocates said that they would have no difficulties accepting a fence built either on the green line (the 1949 armistice

boundary) or on Israeli territory. Most focused attention on how the fence deals with settlements, and the fence was almost universally derided as an attempt to annex occupied territory, Israel's assertion of a "temporary" barrier dispatched as insincere or untrue. One advocate alluded to press reports that the Israeli government would alter the route of the fence as irrelevant to the proceedings. While most employed fairly straightforward descriptions, some resorted to sharp rhetorical barbs, such as the Arab League's advocate, Professor Michael Boethe, who referred to "fragmentation of the Palestinian space" as "Bantustanization."

-- Terrorism: Many of the advocates claimed to understand Israel's legitimate concerns about terrorism. Several, including Palestine's al-Kidwa, urged the Court to distinguish between attacks on Israelis within the Green Line and attacks in the territories against "the occupation", settlers and soldiers. Jordan's Prince al-Hussein condemned suicide attacks as "nothing less than horrific" but also observed that such bombings "must be weighed against almost four decades of Israel dominating and, by virtue of its occupation, degrading, an entire civilian population." The OIC's advocate was rather strident on this score, with Israeli and UK official observers believing she tiptoed on the line of justifying suicide bombers.

-- The role of the UNGA: Most delegations made the argument that the UNGA bears, in one advocate's phrase, "a permanent responsibility over the question of Palestine." One noted that the UNGA's role in Palestine predates Israel's existence, and several made reference to Palestinian territorial rights on the basis of the 1947 UNGA resolution (181) which partitioned the territory for a Jewish and Arab state in British Mandatory Palestine. For many, the question of the UNGA role had particular relevance in considerations as to what the UNGA would be entitled to do in the event the ICJ finds the fence to violate international law. Several delegations bemoaned the fact that the Security Council had not taken 'effective' action on the Fence issue, giving the UNGA a further basis to take action on its own behalf.

-- The impact on the peace process: Advocates took strong issue with the argument, presented in writing by the UK, USG, Canada, Australia and several others, that an opinion would undermine efforts to enable the Palestinians and Israelis to negotiate a final settlement of the dispute. Jordan's lawyer argued strenuously that the relationship between an opinion and the roadmap "needs disentangling," emphasizing that, in Jordan's view, the roadmap "in legal terms . . . expresses little more than aspirations." In any event, he said, the roadmap is not an "exclusive vehicle for settling particular matters such as the Wall," and concurrent action by the UNGA or the ICJ is not precluded. The idea that an opinion would harm the peace process is "mere guesswork." Belgian advocate (for Palestine) Jean Salmon made the unfortunate comment in favor of an opinion's value to Palestine, "if you want the wolf and the lamb to negotiate, then the lamb needs a minimum amount of protection."

-- Violations of humanitarian and human rights law: All delegations asserted that the fence violates international humanitarian law (IHL), in particular the law governing the rights and responsibilities of an occupying power (specifically referring to the Fourth Geneva Convention of 1949 and the 1907 Hague Regulations). Several sought to discredit Israel's long-maintained argument that the Fourth Geneva Convention does not apply in the occupied territory. Persistent reference was made to the obligation of an occupying power, under Article 47 of the Fourth Geneva Convention, not to permit population transfers into or out of occupied territory, described on several occasions as a "grave breach" of the Convention punishable as a war crime. Several advocates referred approvingly to the February 18 press release of the International Committee of the Red Cross (ICRC) which concluded that "the West Bank Barrier, in as far as its route deviates from the 'Green Line' into occupied territory, is contrary to IHL." One advocate read the entire release into the record, and several echoed one advocate's description of the ICRC as "the institutional guardian of the Geneva Conventions." Other advocates referred to violations of human rights instruments in addition to IHL.

-- Military necessity and proportionality: Several advocates argued that Israel could not rely on the concept of "military necessity" or self-defense in a general sense to justify the fence. Egyptian IHL expert, Professor Georges Abi-Saab, made a sustained argument that military necessity must be considered only in the context of specific provisions of IHL, and that in no such provisions could a justification for the fence be found. Many argued that the protection of settlements was an "unacceptable" or "impermissible" justification for self-defense or military necessity. Similarly, several advocates alluded to the effects of the fence on Palestinians as being disproportionate to the

self-defense or law-and-order rationales that Israeli might be expected to employ to justify its barrier.

-- Consequences of an opinion: The basic argument of delegations was that, if the Court finds the fence to be illegal, Israel must cease construction, tear it down and compensate Palestinians for damages. Some advocates argued that, since an opinion would be rendered to the UNGA directly, the UNGA or the Security Council would be responsible for determining the steps Israel and other states should take. Several also argued that all states would have an obligation to prosecute or extradite those persons found on their territory who are allegedly responsible for "grave breaches" of IHL.

15. (SBU) The absence of Israel, the USG and other governments which participated in the written phase of the proceeding was only occasionally mentioned. Israel's absence and its failure to argue the merits of the fence, in the phrase of one advocate, "estopped" it from arguing that the Court would have incomplete facts before it to render an opinion. Few remarked upon the USG's role in the peace process or absence from the proceedings. An advocate for Palestine argued that other members of the Quartet did not oppose an opinion, and he added that "we even doubt whether" the USG statement can be characterized as opposing an opinion, considering instead a "caution" that any opinion not tread too heavily on general final status issues. A few advocates, in asserting the lack of "effective" action by the Security Council, referred obviously to the use or threatened use of the veto by "one Member".

16. (SBU) The close of the oral phase means that the Court now retires to deliberations. The Court treated the UNGA request as urgent, and it is expected that the Court will endeavor to render its opinion on an urgent basis as well. Whenever the opinion is rendered, it is likely that the Court will announce a public reading of the opinion approximately one week before such an event.

17. (C) Comment: All in all, the proceedings surprised many observers. They were typical of Court proceedings and thus, to some, rather boring -- the courtroom's thinning over the course of the proceedings may reflect such a view. The repetitiveness of the arguments, suggesting a lack of coordination among delegations, may have diminished their impact somewhat. The proceedings were certainly not the "circus" many expected. The Israeli observers shared this perception but expressed to embassy legal officer their view that the proof of seriousness will be in the opinion, and the focus of their anxieties is now on the rendering of an opinion. The main concern of several governments -- that the Court not make pronouncements that would make final status negotiations more difficult -- may not have been alleviated by the proceedings, since many of the advocates invited the Court to make assessments of the legal nature of the Green Line and the West Bank and East Jerusalem. Few observers are confident that the Court will decline to accept such invitations. End comment.
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